No. 96-134

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

BERNARD GIFFLER,

Petitioner,

vs.

GENE P. ABEL, N. ROBERT LAWS, JACQUELINE WOLCHKO, JOHN M. TOTH, CHARLES D. BAKER, PATRICIA A. CHENEY, DONNA L. FAUNCE, CARL F. HAEUSSLER, GERYL D. McMULLIN, ERIC N. RAFFLE and ELIZABETH A. YONSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This action was brought by petitioner Bernard Giffler ("Giffler") against the business administrator, school superintendent and individual school board members of the Central Bucks School District, Bucks County, Pennsylvania. Giffler is a resident of the district. He sought relief in federal court claiming that his First Amendment right of free expression and his constitutional right to due process were infringed when the business administrator placed a restriction on Giffler's facsimile ("fax") transmissions to the single fax machine installed at the central business office of the school district. This restriction was made due to Giffler's practice of faxing voluminous documents which interfered with the district's conduct of its day-to-day business on the fax machine. Giffler's faxing of non-business messages, which he has described as "political newsletters", was restricted to non-business hours. When he violated the restriction, a "call-block" was put in place which barred any receipt of his fax messages by this single fax machine at the business office. Giffler was advised that this "call block" would be removed if he would agree in writing to transmit his non-business fax messages only during non-business hours. After six weeks he agreed, under protest, and abided by the agreement during the relevant time period thereafter.

Giffler then filed this civil action in federal court. He sought an order barring the district from imposing any restriction on his transmissions to the business office fax machine; further, he requested unspecified damages for the alleged violation of his claimed First Amendment right to have the district accept his messages transmitted to this particular machine whenever he chose, or, at minimum, on terms negotiated with and acceptable to him.

In response to a preliminary motion seeking more

specificity regarding Giffler's claim of denial of due process, the court allowed Giffler to amend his complaint. In the amended complaint Giffler asserted that the officials of the school district should not have been able to impose or enforce their restriction on his use of the business office fax machine unless they first initiated some form of "police action" against him, or sought a "court order" in a judicial proceeding, or submitted the matter to some other "adjudicative agency of government" to resolve his claims.

Giffler's deposition was taken and, thereafter, a motion for summary judgment was filed on behalf of all defendants. The motion was supported by relevant admissions made by Giffler at his deposition along with the sworn affidavit of the district's business administrator (Abel). Giffler's response to the motion consisted solely of a brief in opposition. He had initiated no discovery and offered no formal factual submission to oppose the motion. The district court did accept the factual allegations that were incorporated in his brief as if they constituted an opposing affidavit by him.

The district court concluded that Giffler's response to the motion for summary judgment raised no genuine issue of material fact on any relevant issue. Similar to the approach adopted in the instant petition before this Court, Giffler had argued that the business administrator for the school district had lied to or misled the district court in his affidavit. The district court, in its opinion, explicitly found that on all relevant legal issues there was no genuine dispute of fact. Summary judgment was entered for all defendants.

On the First Amendment claim the court first concluded, as a matter of law, that the district's fax machine was not a "traditional public forum". It was not, for example, a park or other recognized place of public assembly. Likewise, the court

found no ground for any genuine dispute on the issue of whether the school district took any deliberate action to open the use of its business office fax machine for exchange of opinions on non-business matters. To the contrary, with the exception of Giffler's transmissions, message traffic on the machine had been confined to the day-to-day business management of the district.

The district serves approximately 12,500 students. It has over 1,000 employees and more than 16 schools. The fax machine in question, located at the district's administration center, handles message traffic for the numerous departments which conduct the day-to-day business of the district: purchasing, bookkeeping and accounting, human resources/ personnel, public relations, and others. The superintendent of schools and his assistants operate from this office. The fax machine in question, at all relevant times, was the single such machine available in the business office for the immediate exchange of business related documents which needed prompt attention. These documents included, for example, communications with the administrators and teachers of individual schools, other school officials at the local, intermediate and state level, and communications with independent contractors, vendors and bidders regarding construction, maintenance and service contracts.

Under the circumstances, the district court concluded that since the message traffic on the machine had been confined to these sorts of day-to-day business functions, the machine had not been "opened" as a "limited public forum". The court concluded, as a matter of law, that the fax machine should be considered a "non-public forum".

The court then reviewed whether the restriction on Giffler's non-business fax transmissions to times outside regular business hours raised any genuine issue that the school district was

attempting to "suppress" his political views. The court found no factual support for the claim. In order to keep the line open for message traffic related to business, Giffler was advised by the district's business administrator that his messages on this particular machine could be received only before 8:00 a.m. or after 5:00 p.m. on a business day. There was no restriction whatsoever on Giffler's other methods of communicating with the school district or its officials. For example, he could still make regular telephone calls, send correspondence by mail, hand-deliver messages, and continue to attend and speak at regularly scheduled school board meetings which was his regular custom. None of these facts were disputed by Giffler. Save the limited temporal restriction on his use of the business office fax machine, he admitted that all forms of communication between himself and the district, and its officials, were open to him at all relevant times. The court concluded that the district's limited restriction of Giffler's message traffic was reasonable and in no way impermissibly infringed his right of free expression.

As to Giffler's claim that his "due process" rights were denied, the court concluded that he had no recognized life, liberty or property interest in the unrestricted transmission of non-business messages to the district's business office fax machine. As a matter of law, the court rejected Giffler's claim that due process required that the district bring the issue before an independent administrative or judicial tribunal before taking any action to "call block" his transmissions in order to enforce its temporal restriction on transmissions of non-business message traffic by confining such transmissions to non-business hours.

The Third Circuit, without opinion, affirmed the judgment of the district court.

In concluding this outline of relevant facts and proceedings

below, respondent is bound, under Rule 15.1, to make some particular answer to the wide-ranging allegations of petitioner's statement of the case (Petition, pp. 2-7). At no time did the district "permanently" call block transmissions from petitioner's fax machine (Petition, p. 2). When the "call block" was first imposed on Giffler's transmissions, it was made clear to him that it would be lifted if he would simply agree in writing to abide by the restriction which would require him to transmit his non-business "political newsletters" during non-business hours. Six weeks later he agreed to comply, in writing, and the call block was lifted. Thereafter, his non-business messages were received during non-business hours.

At no time was the "importance" of Giffler's messages somehow balanced against the importance of business message traffic (Petition, p. 2). Rather, it was reasonably concluded that the volume of Giffler's non-business message traffic during the business day had become a hinderance that could be reasonably regulated by restricting this message traffic to non-business hours. In that way, both his goals and the goals of the district could be accomplished without interference.

Giffler was advised of the restriction being imposed on his message traffic not only in a letter at the end of June 1994 but, on several prior occasions, he was advised orally of the restriction. He was given substantial notice that he was to restrict his transmissions outside business hours.

When he was advised that he had violated the restriction, and that the call block was being imposed, he may well have viewed his actions as innocent and mistaken. Yet, rather than agree to submit to the reasonable regulation by making a written commitment to do so, he argued that the district should consider alternative sorts of restrictions that might be more acceptable to him (Petition, pp. 2-5). The law does not require such bargaining over the use of an internal business communications device.

Giffler presents an extended discussion of the mechanism of call blocking, as he understands it, and what he believes are inherent improprieties in that system. Yet, he acknowledges that any complaint of his in this regard was not made a subject of the instant action (Petition, pp. 3-4).

Giffler disputes that he sent eight faxed messages to the district's fax receiver on July 1, 1994 in violation of the restriction. He claims that there were only two messages transmitted after the beginning of business hours (8:00 a.m.) and that that occurred by mistake (Petition, pp. 5-6). This is an example of a proposed "factual dispute" which the district court found irrelevant. The court held that since the business fax machine constituted a "non-public forum" the school district had a right to impose reasonable regulations on the use of this business machine as long as those regulations were not used to suppress the views of the sender. Implicitly, the court ruled that issues such as the number of faxes sent during business hours in violation of the regulation was not relevant to a determination of whether free expression rights had been violated. Mistakenly or not, the simple requirements of the limited regulation had not been complied with by Giffler. The limited sanction of call blocking was imposed until he would agree in writing to abide by the requirements of the regulation. In the meantime, and at all relevant times, he was never denied the right to communicate with the district by any other available means and there is no factual dispute that he did use those alternatives (District Court Opinion, pp. A-8 to A-13).

REASONS FOR DENYING THE WRIT

Petitioner's request for a writ of certiorari should be denied because the question presented suggests no special or important reason for granting the writ.

Specifically, this is not a case where the Third Circuit has rendered a decision in conflict with any other United States Court of Appeals, nor has it decided a federal question in a way conflicting with a state court of last resort.

The Third Circuit affirmed the judgment of the district court without deeming it necessary to render any opinion in support of its action. It implicitly found the result reached by the district court to be correct. In so doing, it did not depart in any fashion from the accepted and usual course of judicial proceedings, nor did it sanction any such departure by the district court. Thus, there is no requirement for an exercise of this Court's power of supervision.

Most importantly, the question presented for review by the petitioner does not, in any fashion, present an important question of federal law. Petitioner specifically asks this Court to review the correctness of the district court having granted summary judgment when "there remain substantial issues of material fact". District courts routinely review the factual submissions of the parties in order to determine whether summary judgment is appropriate under Fed. R. Civ. P. 56. A review of the district court's opinion supporting the grant of summary judgment in this case makes clear that the court thoroughly reviewed the opposing factual claims of petitioner, defined the relevant legal issues on his constitutional claims, and found that with regard to the facts specifically relevant to those legal claims, there was no genuine dispute which would render summary judgment inappropriate (A-3 to A-15). Petitioner would propose that this Court comb back over the record to determine whether the district court was in error in finding that no material fact was in genuine dispute. That task has already been accomplished by the Third Circuit. The same issue was raised before the Court of Appeals and petitioner's appeal was rejected. Even if another review were called for by this Court, a finding in petitioner's

favor would provide no precedent of national value or import. Petitioner essentially asks that this Court to reconsider the factual basis for a grant of a motion for summary judgment. By definition, this is not the sort of exercise for which this Court has reserved the important writ of certiorari.

Petitioner elaborates on his "Question Presented" by adding several paragraphs that are more appropriate to his "Statement of the Case". However, in his concluding paragraph expanding on the "question" he suggests that this Court should also consider whether, in ruling on his First Amendment claims, the district court wrongly construed this Court's decision in *Perry Educ. Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37 (1983) and the Ninth Circuit opinion in *Destination Ventures Ltd. v. F.C.C.*, 46 F.3d 54 (9th Cir. 1995). The district court's citation to the *Destination Ventures* case had nothing to do with its holding in this matter. It was cited simply as the one case which the court's research disclosed which raised considerations of First Amendment rights and fax technology, but in a different factual context from the instant case (commercial speech). Therefore, the district court's reference to that case would give rise to no appealable or reviewable issue in any event.

Petitioner had argued to the Third Circuit that this Court's *Perry* decision was misapplied in the instant case. Again, the Third Circuit dismissed the appeal on all grounds, including that claim of error.

The core of petitioner's complaint, setting factual issues aside, raised the question of whether the school district's single business office fax machine was appropriately categorized as a "non-public forum". This Court has already set forth detailed guidance on how a claimed breach of a First Amendment right should be evaluated in a similar context. The district court in this case specifically cited, and relied upon, this Court's decision in

the *Perry* case and its subsequent decisions in *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788 (1985) and *Krishna Society v. Lee*, 505 U.S. 672 (1992) (A-8 to A-13). The instant matter does not present a case where this Court should address the "non-public forum" issue another time. The law on this issue has been thoroughly discussed in prior decisions. Lower courts have ample guidance on the issue already. The decision made by the district court in this case, and affirmed by the Third Circuit, in no way conflicts with the prior relevant decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny Giffler's petition for a writ of certiorari on the question presented.

Respectfully submitted,

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